

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LINDA CUNEO	:	DETERMINATION
	:	DTA NO. 818618
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law and New York City Earnings Tax on	:	
Nonresidents under Chapter 19, Title 11 of the	:	
Administrative Code of the City of New York for the	:	
Years 1994 and 1995.	:	

Petitioner, Linda Cuneo, 1844 Bedford Avenue, Merrick, New York 11566, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City earnings tax on nonresidents under Chapter 19, Title 11 of the Administrative Code of the City of New York for the years 1994 and 1995.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York on June 11, 2003 at 10:45 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jeffrey Mason).

Since neither party herein elected to reserve time to file a post-hearing brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

ISSUE

Whether petitioner has established that the substantial understatement of tax at issue herein was attributable solely to her husband's activities, that in signing the tax returns she did not know or had no reason to know of the substantial understatement and that it would be inequitable

to hold her liable for the asserted deficiency given the facts and circumstances and should thus be relieved from liability for the deficiency in tax pursuant to Tax Law former § 651(b)(5).

FINDINGS OF FACT

1. Petitioner herein, Linda Cuneo, together with her spouse, Charles Cuneo, filed timely joint New York State resident income tax returns for the years 1994 and 1995 whereon the following items of income were included in reported New York adjusted gross income:

ITEM	1994	1995
Wage income	\$23,640.00	\$15,480.00
Interest income	32.00	286.00
Dividend income	86.00	-0-
Capital gain	1,431.00	-0-
Unemployment compensation	-0-	695.00
Gambling winnings	-0-	4,000.00
New York adjusted gross income	\$25,189.00	\$20,461.00

2. The returns for the two years at issue, in addition to computing New York State tax due, also reported that the wage income reflected on the returns was subject to the New York City earnings tax on nonresidents. The wage income reported on the returns was earned entirely by petitioner's husband, Charles Cuneo, as a truck driver for Sheffield Oil Co., Inc., a company located in Brooklyn, New York.

3. On April 8, 1998, Charles Cuneo pled guilty in New York County Supreme Court to grand larceny in the fourth degree, the seventh count of New York County Indictment 5251 of 1998, in full satisfaction of the entire indictment against him. In his plea allocution, Mr. Cuneo admitted that from on or about September 22, 1993 to on or about October 28, 1995 he stole property having a value in excess of \$50,000.00 from the City of New York. Mr. Cuneo

admitted that he took part in a scheme which involved the delivery of air in place of fuel heating oil to New York City, thus causing the delivery tickets to reflect delivery of more fuel oil than was actually delivered. Mr. Cuneo also admitted that in exchange for pumping air instead of fuel oil, thus causing the City of New York to be overbilled, he received a percentage of the overbilled amounts in cash in an amount exceeding \$50,000.00.

4. In the course of its investigation of Sheffield Fuel Oil Co., Inc., the New York District Attorney's office prepared a worksheet entitled "Summary of Alleged Excess Oil Deliveries and Payments to Sheffield Fuel Oil Co., Inc. It's Drivers." The summary worksheet contained the names of seven drivers and a list of the number of gallons of fuel oil applicable to each driver for 1994 and 1995. The worksheet reflected that a total of 12,590,681 gallons of excess fuel oil deliveries were made by the seven drivers during 1994 and 1995 and using the "lowest price during the contract period" of \$.4044, the "total applicable to Sheffield Fuel Oil Co." was \$5,091,671.40 (12,590,681 gallons x \$.4044). With respect to "Charlie Cuneo" the summary worksheet contained the following entries:

1994 Gallons	1995 Gallons	Total Gallons	1994 Am't	1995 Am't	Total Am't
904,489	2,292,005	3,196,494	\$90,448.90	\$229,200.50	\$319,649.40

In computing the dollar amounts shown in the above table, the New York District Attorney's office determined that Sheffield Fuel Oil Co. paid "Charlie Cuneo" \$.10 for each gallon of excess fuel oil reflected on the delivery tickets he generated to the City of New York.

5. The New York District Attorney's office shared the information regarding its investigation of Sheffield Fuel Oil Co., Inc. and its drivers with the Division of Taxation ("Division") and based on this information the Division determined that Mr. and Mrs. Cuneo had understated reported New York adjusted gross income by \$90,448.90 for 1994 and \$229,200.50

for 1995. Accordingly, on August 11, 2000, the Division issued a Notice of Deficiency to petitioner and her husband asserting that \$26,367.92 of additional New York State personal income tax and New York City nonresident earnings tax was due for the years 1994 and 1995. The notice also asserted that penalties, imposed pursuant to Tax Law § 685(b) for negligence and section 685(p) for substantial understatement of liability, and interest were due. Petitioner's husband did not file a petition contesting the Notice of Deficiency with the Division of Tax Appeals and therefore he is not a party to this proceeding.

6. Petitioner does not dispute the Division's computation of additional tax due for the two years at issue; however, she maintains that she should be relieved from joint liability for the tax, interest and penalties asserted due in the Notice of Deficiency dated August 11, 2000 pursuant to the so called innocent spouse provisions of Tax Law former § 651(b)(5).

7. Petitioner was born in 1951, and in 1967, she started working part time for Merrill Lynch & Co., Inc. Petitioner finished her high school education in 1969; however, she did not receive a diploma since she did not successfully complete an English course. To this date petitioner does not possess a high school or equivalent diploma. From 1969 to 1978 petitioner was employed full time with Merrill Lynch & Co., Inc.

8. In 1977 petitioner and Charles Cuneo were married, and their first child was born in June 1978 and their second child in June 1981. Petitioner resigned from her job at Merrill Lynch & Co., Inc. after the birth of her first child and she remained a stay-at-home mom throughout the years at issue in this proceeding.

9. From the date that they were married in 1977 to 1988, petitioner, and her husband and two children, resided in a small two-bedroom apartment in Ozone Park, New York. In 1988, petitioner's parents sold their former residence and purchased a new house at 1844 Bedford

Avenue, North Merrick, New York for the sum of \$245,00.00. Title to this property was held by petitioner's parents, Michael T. Colombo and Sarah J. Colombo, and petitioner's husband, Charles Cuneo. By quitclaim deed dated August 22, 1998, Charles Cuneo relinquished his ownership interest in the 1844 Bedford Avenue property to Michael T. Colombo and Sarah J. Colombo. Pursuant to a deed dated September 23, 1998, title to the 1844 Bedford Avenue property was changed to Michael T. Colombo, Sarah J. Colombo and Linda Cuneo as joint tenants with right of survivorship.

10. In 1988, petitioner and her family, together with petitioner's parents, moved into the house located at 1844 Bedford Avenue and petitioner has continuously resided at this address since 1988. Mr. Cuneo resided at the 1844 Bedford Avenue address until his incarceration and upon his release from prison he established a residence separate from petitioner. Petitioner and her husband are currently in the process of divorce.

11. Petitioner was unaware of her husband's illegal activities with respect to the delivery of air instead of fuel oil to the City of New York, and she has no idea if in fact her husband was paid \$90,448.90 in 1994 and \$229,200.50 in 1995 by Sheffield Fuel Oil Co., Inc. for his participation in this scheme. Petitioner does not know the whereabouts of the \$319,649.40 her husband allegedly received from Sheffield Fuel Oil Co., Inc. and she is certain that none of these payments ever came into the household budget which she controlled.

SUMMARY OF THE PARTIES' POSITIONS

12. The Division maintains that petitioner should not be afforded "innocent spouse" status for the following reasons:

a. Petitioner is presently married to Mr. Cuneo and she has adduced no documentary evidence that a separation or divorce decree exists;

b. Petitioner directly or indirectly benefitted from the understatement of income since for the years at issue the Cuneos, on paper, supported a family of four on a small residual income without public assistance. In the Division's view this suggests the existence of unreported income;

c. Petitioner participated in family financial affairs and possessed the educational level and business acumen to understand these matters; and

d. Petitioner had a duty to inquire as to the source of family income and had reason to know of the unreported income.

13. Petitioner acknowledges that while the tax returns for 1994 and 1995 reflect a relatively small gross income for a family of four, she maintains that her living expenses were nominal since she lived with her parents essentially rent free. Also, petitioner asserts that family members on both her side and her husband's side routinely provided food for the family and clothing for the children.

CONCLUSIONS OF LAW

A. For the years in dispute the Tax Law provided that when a husband and wife file a joint income tax return their tax liabilities shall be joint and several. However, Tax Law former § 651(b)(5)(A) provides that if:

(i) a joint return has been made under this subsection for a taxable year, (ii) on such return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse, (iii) the other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there was such substantial understatement, and (iv) taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such substantial understatement, then the other spouse shall be relieved of liability for tax (including interest, penalties and other amounts) for such taxable year to the extent that such liability is attributable to such substantial understatement.

B. In the instant matter there is no dispute that the substantial understatement of tax at issue herein was clearly attributable to grossly erroneous items of Charles Cuneo and was in no way attributable to activities conducted by petitioner. Thus, in order to be relieved from joint liability for the tax at issue petitioner must establish (Tax Law § 689[e]) that in signing the returns she had no knowledge of or reason to know of the understatement; that she did not benefit either directly or indirectly from the understatement; and that given the facts of this case it would be inequitable to hold her liable for the asserted deficiency (20 NYCRR 151.10[e]).

C. Careful examination of the entire record, including petitioner's credible testimony, leads me to the conclusion that she has met the conditions set forth in Tax Law former § 651(b)(5)(A) and, therefore, is to be relieved from joint liability for the deficiency asserted in the notice dated August 11, 2000. There is no credible evidence in the record before me which establishes that petitioner was aware of her husband's illegal activities and in any manner benefitted from the income he generated from such activities.

D. The petition of Linda Cuneo is granted and the Notice of Deficiency dated August 11, 2000 is, as it relates to petitioner Linda Cuneo, hereby canceled in total.

DATED: Troy, New York
September 11, 2003

/s/ James Hoefer
PRESIDING OFFICER